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Preparatory Commission for the International Criminal Court

Working Group on Elements of Crimes

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Request from the Governments of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea, South Africa and the Permanent Observer Mission of Switzerland to the United Nations regarding the text prepared by the International Committee of the Red Cross on article 8, paragraph 2 (e) (i), (ii), (iii), (iv), (ix) and (x), of the Rome Statute of the International Criminal Court*

Note verbale dated 23 November 1999 from the Permanent Missions of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South Africa to the United Nations and the Permanent Observer Mission of Switzerland to the United Nations addressed to the Secretary-General

The Permanent Missions of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South Africa to the United Nations and the Permanent Observer Mission of Switzerland to the United Nations have the honour to attach the text of a paper prepared by the International Committee of the Red Cross (see annex) in order to assist the Preparatory Commission in elaborating the text on the elements of crimes for the Court. The material in the paper relates to the crimes listed in article 8, paragraph 2 (e) (i), (ii), (iii), (iv), (ix) and (x), of the Statute.

The Permanent Missions of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South Africa and the Permanent Observer Mission of Switzerland to the United Nations request the circulation of the present note verbale and its annex as a document of the Preparatory Committee.

* The annex to the present document is issued in the language of submission only. Other language versions of the annex will be made available at a later date.

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Annex

Paper prepared by the International Committee of the Red Cross relating to the crimes listed in article 8, paragraph 2 (e) (i), (ii), (iii), (iv), (ix) and (x), of the Rome Statute of the International Criminal Court

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INTRODUCTION

It was agreed during the Diplomatic Conference on the Establishment of an International Criminal Court, held in Rome from 15 June to 17 July 1998, that a draft text on the elements of the crime of genocide, crimes against humanity and war crimes was to be prepared by the Preparatory Commission. In this respect, Article 9 of the Statute of the International Criminal Court (the "ICC Statute") states that the "*[e]lements of crimes shall assist the Court in the interpretation and application of Articles 6, 7, and 8. They shall be adopted by [...] the members of the Assembly of States Parties*". This paper is intended to assist the Preparatory Commission in preparing the text on the elements of crime for Article 8 (2) solely by presenting relevant sources and indicating the results that emerge from these sources. It does not reflect any decision taken at a previous session of the Preparatory Commission. Part VII deals exclusively with specific war crimes as listed in Article 8 (2) (e) of the ICC Statute.

The review of sources consisted in an exhaustive research and analysis of the relevant case law and international humanitarian law and human rights law instruments. As regards case law, a review of cases from the Leipzig Trials, from post Second World War trials, including the Nuremberg and Tokyo trials as well as national case law, and decisions from the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda was done. National case law on war crimes was examined when it was available in English, French or German. Decisions from international and regional Human Rights bodies were also analysed for further clarification on certain offences. It is important to note that the various sources referred to in this paper were selected solely in an objective manner and based on their relevance and shall not be seen as a reflection of any particular view or position. In contrast to the previous parts of the study, the ICRC had to rely to a greater degree on legal writings and views expressed in military manuals, since the conduct of hostilities, dealt with in the crimes analysed in this part of the study, so far has only rarely been the subject of international or national case law.

The paper is structured in the following manner. First, the results from the sources are outlined for each offence listed under Article 8 (2) (e) of the Statute. The term "material element" is used to describe the *actus reus* of the offence (the act or omission) and "mental element" to describe the *mens rea* or necessary intent to commit the offence. Second, a commentary containing an analysis of the various sources under review shows the legal basis for the results indicated.

It is important to note that this paper does not deal with the responsibilities of commanders, superiors and subordinates (Art. 28 ICC Statute) nor questions concerning crimes committed by incitement, attempt, conspiracy or other forms of assistance (Art. 25 ICC Statute).

ABBREVIATIONS

The following abbreviations are used throughout this paper:

ACHPR:	African Charter on Human and Peoples' Rights
A.D.:	Annual Digest and Reports of Public International Law Cases
AP I:	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977
AP II:	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977
ICCPR:	International Covenant on Civil and Political Rights
ECHR:	European Court of Human Rights
GAOR:	General Assembly Official Records
GC:	Refers to all four (4) Geneva Conventions
GC I:	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
GC II:	Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949
GC III:	Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949
GC IV:	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949
IACHR:	Inter-American Commission (or Court) on Human Rights
IAYHR:	Inter-American Yearbook on Human Rights
ICC:	International Criminal Court
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the former Yugoslavia
ILM:	International Legal Materials

ILR:	International Law Reports
UN Doc.:	United Nations Document
UNGA Res.:	United Nations General Assembly Resolution
WCC:	War Crimes Commission

Article 8 Paragraph 2 (e) ICC Statute

- OTHER SERIOUS VIOLATIONS OF THE LAWS AND CUSTOMS APPLICABLE IN ARMED CONFLICTS NOT OF AN INTERNATIONAL CHARACTER -

General points common to the offences under Article 8 (2) (e) of the ICC Statute

(1) The acts or omissions are committed in the context of an armed conflict not of an international character.

For the Commentary see Part IV of the ICRC Study dealing with other crimes under Art. 8 (2) (e) of the Statute.

Comments on specific offences

General remarks relevant to all offences

- With respect to the terms "unlawful" or "lawful", as used in the elements of several offences, it is important to emphasise that they refer to the lawfulness under international law.
- The notion "wilful" in the following sections includes "intent" and "recklessness", but excludes ordinary negligence. The term "knowingly" must be understood in the sense of Art. 30 ICC Statute which defines "knowledge" as meaning awareness that a factual circumstance exists or a consequence will occur in the ordinary course of events (cf. Art. 30 (3)).

Art. 8 (2) (e) (i) - Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities

1. Results from the sources

Material elements

(1) The perpetrator directed the attack against the civilian population or individual civilians, not directly taking part in hostilities.

Mental element

(2) The perpetrator knew or should have known the factual circumstances that established the civilian status of the population or individual persons attacked;
(3) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

This offence is derived to a large extent from Art. 13 (2) 1st sentence AP II which reads as follows:

> *"The civilian population as such, as well as individual civilians, shall not be the object of attack."*

b) Legal basis

Unlike in AP I applicable to international armed conflicts, the instruments applicable to non-international armed conflicts do not define the notions of "attack", "civilian population" or "civilian". Art. 13 (3) AP II provides in the same manner as AP I the conditions under which civilians lose their protection ("Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities."). The question becomes, however, whether these terms must be interpreted in the same way in international and non-international armed conflicts.[1]

The ICTY Trial Chamber found in the *Martic Case* (Rule 61 proceeding) that

> *"[t]here exists, at present, a corpus of customary international law applicable to all armed conflicts irrespective of their characterization as international or non-international armed conflicts. This corpus includes general rules or principles designed to protect the civilian population as well as rules governing means and methods of warfare. As the Appeals Chamber affirmed, [...] the prohibition on attacking the civilian population as such, or individual civilians, are both undoubtedly part of this corpus of customary law [...]."*[2]

Although the Tribunal did not specifically refer to the elements of crime, one might conclude from this finding that the crime is identical in international and non-international armed conflicts and therefore its constituent elements are the same for both situations.

The following ICTY finding describes more generally the difficulty in applying rules applicable in international armed conflicts to non-international armed conflicts:

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[1] With respect to the notion of "attack" the ICRC commentary states: *"Protocol I defines attacks. This term has the same meaning in Protocol II"*, Junod, in: Commentary on the AP, Art. 4, No. 4783, p. 1452. See also in this context Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Introduction, Part IV Civilian Population, pp. 672 *et seq.*

[2] ICTY, *The Prosecutor v. Milan Martic*, IT-95-11-R61, ILR Vol. 108, para. 11, p. 45. See also ICTY, *The Prosecutor v. Dusko Tadic*: Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, IT-94-1-AR72, paras. 100 *et seq.*, pp. 55 *et seq.*

"The emergence of [...] general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts."[3]

Later in the same case the Tribunal held:

"Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules [...] cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks [...]."[4]

This might be an indication that the following conclusions drawn for international armed conflicts applies also to non-international armed conflicts:

"This offence is not limited to attacks against individualized civilians. It essentially encompasses attacks that are not directed against a specific military objective or combatants or attacks employing indiscriminate weapons or attacks effectuated without taking necessary precautions to spare the civilian population or individual civilians, especially failing to seek precise information on the objects or persons to be attacked."[5]

To date, on the basis of existing case-law no further conclusions may be drawn regarding the applicability of these rules to non-international armed conflicts.

However, with regard to the question of reprisals against the civilian population as such, or individual civilians, the ICTY in the *Martic case* (Rule 61 proceeding), held that the prohibition applies to both international and non-international armed conflict. Although the legal instruments applicable to non-international conflicts do not contain an explicit prohibition in this regard, the Trial Chamber found:

"[...] the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts."[6]

With respect to non-international armed conflicts, the Tribunal argued:

"[...] Although [Additional] Protocol II does not specifically refer to reprisals against civilians, a prohibition against such reprisals must be inferred from its Article 4. Reprisals against civilians are contrary to the absolute and non-derogable

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3 ICTY, *The Prosecutor v. Dusko Tadic*: Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, IT-94-1-AR72, para. 126, p. 67.

4 ICTY, *The Prosecutor v. Dusko Tadic*: Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, IT-94-1-AR72, para. 127, p. 67.

5 See ICRC study in PCNICC/WGEC/INF.2/Add.1, p. 10.

6 Decision (Review of Indictment), 08.03.96, No IT-95-11-I, para. 17, p. 7.

prohibitions enumerated in this provision. Prohibited behaviour must remain so 'at any time and in any time and in any place whatsoever'. The prohibition of reprisals against civilians in non-international armed conflicts is strengthened by the inclusion of the prohibition of 'collective punishment' in paragraph 2 (b) of Article 4 of Protocol II."[7]

N.B.: It must be indicated that there is no state practice or *opinio iuris* constituting customary international law that would allow reprisals in non-international armed conflicts. The concept of reprisals does not as such apply to internal armed conflicts and therefore reprisals are prohibited.[8]

Art. 8 (2) (e) (ii) - Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law

1. Results from the sources

Material elements

(1) The perpetrator unlawfully directed an attack against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law.

Mental element

(2) The perpetrator acted wilfully

2. Commentary

a) Treaty reference of the war crime

There is no single treaty reference for this war crime. It encompasses various prohibitions of attack as contained in AP II. The relevant provisions are cited below. In addition, the substance of this war crime may be inferred from common Art. 3 GC which states that *"[t]he wounded and sick shall be collected and cared for."* The collection and care of wounded and sick may be carried out only if the personnel, buildings, material, units and transport involved in such activities are protected against attacks. In accordance with common Art. 3 GC the personnel is protected if they are not taking an active part in the hostilities.

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[7] ICTY, *The Prosecutor v. Milan Martic*, IT-95-11-R61, ILR Vol. 108, paras. 15 *et seq.*, p. 47.

[8] ICRC (ed.), Fight it right. Modern Manual on the Law of Armed Conflict for Armed Forces, 1999, para. 2122, p. 170.

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date.

aa) Remarks concerning the material element

The conclusions stated under the section dealing with the respective offence in the context of an international armed conflict (Art. 8 (2) (b) (xxiv) of the Statute) also apply to this offence when committed in the context of a non-international armed conflict. Given that both offences are formulated in exactly the same manner, on the basis of the ICC Statute one might conclude that this offence has the same special constituent elements in an international or non-international armed conflict. The following analysis of other sources does not suggest a different conclusion.

Attack

There are no indications that the notion of attack has a divergent meaning in non-international armed conflicts to that in international armed conflicts (Art. 49 (1) AP I).[9]

Buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law

While the GC and AP I contain a wide range of provisions regulating the protection of specific buildings, material, medical units and transport, and personnel against attacks and their legitimate use of the distinctive emblem of the GC, there are only few rules under treaty law for non-international armed conflicts. The latter rules are of a more general nature.

The rules in AP II, unlike AP I, do not contain any definition for the terminology used in the substantial provisions. However, the following indications on the *travaux préparatoires* taken from the ICRC commentary clarify that the AP I terminology applies to the corresponding terms in AP II as well:

> *"In the end the definitions were omitted from the final version of Protocol II as part of the proposal to simplify the text [...]. This was not because of controversies about matters of substance, but in a genuine attempt to simplify the text. The Part as a whole was not called into question, even though it was negotiated on the basis of definitions which were not adopted. The terminology used is identical to that of Protocol I and the definitions given there in Article 8 '(Terminology)', though of course they have no binding force in Protocol II, nevertheless constitute a guide for the interpretation of the terms."*[10]

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9 With respect to the notion of "attack" the ICRC commentary states: *"Protocol I defines attacks. This term has the same meaning in Protocol II"*, Junod, in: Commentary on the AP, Art. 4, No. 4783, p. 1452. See also in this context Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Introduction, Part IV Civilian Population, pp. 672 *et seq.*

10 Junod, in: Commentary on the AP, Introduction, Part III - Wounded, sick and shipwrecked, No. 4631, p. 1403 (footnotes omitted). See also Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Part III, Introduction, p.p. 655 *et seq.*; Declaration or understanding submitted by the United States upon signature of AP II: *"It is the understanding of the United States of America that the*

The following provisions are of relevance for the offence under consideration:

Art. 9 AP II[11]
"1. Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. [...]."

Art. 11 AP II[12]
"1. Medical units and transports shall be respected and protected at all times and shall not be the object of attack.
2. The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may, however, cease only after a warning has been given setting,

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terms used in Part III of [Protocol II] which are the same as the terms defined in Article 8 of Protocol I shall so far as relevant be construed in the same sense as those definitions.", ibid., p. 656.

[11] Concerning the question who fall under the definition of medical and religious personnel, the ICRC Commentary indicates the following:

"The Working Group which studied questions relating to Articles 15, 16 and 18, (5) to be dealt with by Committee II, considered in its report that the term 'medical personnel', as used in Protocol II, should include all the categories of persons listed in Article 8 '(Terminology)', sub-paragraph (d), of Protocol I. As regards religious personnel, the Working Group formally raised the question whether the term 'religious personnel' should have a wider scope than it had at that stage of the negotiations in article 15 of Protocol I '(Protection of civilian medical and religious personnel)', and wider than was envisaged by Article 24 of the first Convention, and in Articles 36 and 37 of the Second Convention. (7) On the basis of an analysis of this question it was decided that religious personnel should be defined in the same way in the two Protocols."

Therefore, reference may be made, both for medical personnel and for religious personnel, to the definitions of these terms given in Art. 8 AP I, Junod, in: Commentary on the AP, Art. 9, Nos. 4661 *et seq.*, pp. 1418 *et seq.*

[12] Concerning this provision the ICRC Commentary points out:

"Article 11 is basically inspired by Articles 19 and 21 of the first Convention, but it is clearly also related to Articles 20, 35 and 36 of the First Convention, Articles 22, 23 and 24 of the Second Convention, and Articles 18, 21 and 22 of the fourth Convention. In fact, this provision seeks to secure protection and respect for all military or civilian medical transports, on land, in the air, at sea or on lakes or rivers.",

Junod, in: Commentary on the AP, Art. 11, No. 4707, p. 1432.

"The term 'medical unit' is a generic term covering both permanent units, which stay where they are (hospitals, laboratories, equipment depots etc.), and mobile medical units, which may be moved as required (field hospitals, first aid posts, ambulances etc.).
The term 'medical transports' means any land vehicle (cars, trucks, trains etc.), ship, craft or aircraft assigned to transporting the wounded, sick and shipwrecked, medical and religious personnel, and medical equipment. Protection applies for military and civilian medical units and transports, whether they are permanent or temporary, provided that they are exclusively assigned to medical purposes; while they are so assigned, whether or not for an indefinite period, depending on whether they are permanent or temporary, medical units and transports may not be used for any purposes other than medical ones. The concept 'medical purposes' should be understood in a broad sense. It covers not only the care given the wounded, sick and shipwrecked, but also any activities for the prevention of disease, blood transfusion centres, rehabilitation centres for medical treatment and dental treatment.",

ibid., Nos. 4711 *et seq.*, p. 1433 (footnotes omitted).

"Article 11['s] [...] succinct wording does not go beyond expressing a general principle, while Protocol I is far more detailed in this respect. In case of specific difficulties [...] Protocol I may serve as a very useful guide and provide practical solutions which may be relevant, by analogy, for the implementation of the principle.",

ibid., No. 4718, p. 1435. See also No. 4723.

whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded."[13]

Art. 12 AP II:[14]
"Under the direction of the competent authority concerned, the distinctive emblem of the red cross, red crescent or red lion and sun [[15]*] on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly."*

N.B. It is worth noting in this context the relationship between the protection accorded to the above-mentioned personnel and the use of the distinctive emblem. The question arises whether the distinctive emblem is a compulsory condition for the right to protection.

The ICRC Commentary on AP II may be quoted in this regard:

"The use of the emblem is optional; medical personnel and medical units and transports are protected in any event: such protection is expressly granted in Articles 9 '(Protection of medical and religious personnel)' and 11 '(Protection of medical units and transports)'. However, it is the direct interest of those enjoying protection to ensure that they can be identified, not only by the adverse party, but also by the armed forces or armed groups of their own side, particularly in a non-international armed conflict where, in most cases, the area of confrontation is not well-defined, or shifts frequently.
Article 18 '(Identification)', paragraph 1, of Protocol I, provides that 'each Party to the conflict shall endeavour to ensure that medical and religious personnel, and medical units and transports, are identifiable'.
According to Article 12 of Protocol II, 'the distinctive emblem [...] shall be displayed'. In French the future tense is used, rather than the imperative: 'le signe distinctif [...] sera arboré'. This formula shall be taken to express a right and invites use to be made thereof."[16]

Hence, the perpetrator commits a war crime under the Statute only if the persons or objects attacked are protected and use the distinctive emblem in conformity with international law.

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13 With regard to paragraph 2 the ICRC Commentary indicates:
"This paragraph reiterates Article 21 of the first Convention, with slight changes in the wording. In particular, Article 21 does not refer to 'hostile acts', but to 'acts harmful to the enemy'. There is no difference of substance between these two terms.",
Junod, in: Commentary on the AP, Art. 11, No. 4720, p. 1435. See also Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 11, p. 664.

14 Concerning this provision the ICRC Commentary points out:
"This provision is based on the relevant articles of the Conventions, viz., Chapter VII of the first Convention and Chapter VI of the Second Convention, both entitled 'The distinctive emblem', as well as on Articles 18, 20 and 22 of the fourth Convention: these rules were supplemented in Protocol I by Article 18 '(Identification)' and Annex I to that Protocol '(Regulations concerning identification)'.",
Junod, in: Commentary on the AP, Art. 12, No. 4731, p. 1437. See also Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 12, p. 665.

15 Since 1980, this emblem is no longer used.

16 Junod, in: Commentary on the AP, Art. 12, No. 4742, p. 1440.

N.B. Directing attacks against persons or objects using the signals as contained in the revised Annex I of 1993 to AP I in conformity with the previous rules constituting protected status should also fall within the scope of the crime under the Statute. The provisions of the Annex do not enlarge the protection of persons or objects. They are only intended to facilitate the identification of personnel, material, units, transports and installations protected under the GC and the Protocol. Since the protection is only determined by the substantive provisions of common Art. 3 GC and AP II, attacks against such protected objects or persons should also fall under this crime if they use the signals defined in this Annex I to AP I. However, this must be limited to situations in which the attacker had the technical capacity to receive the signals and therefore to identify the personnel or object attacked. This restriction may indirectly be derived from Art. 18 (2) AP I also for non-international armed conflicts. For further details see discussion in PCNICC/1999/WGEC/Inf.2/Add.2 on Art. 8 (2) (b) (xxiv).

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

Art. 8 (2) (e) (iii) - Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict

1. Results from the sources

Material elements

(1) The perpetrator directed an attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations
(2) The objects of attack were entitled to the protection given to civilians or civilian objects under the international law of armed conflict

Mental element

(3) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

There is no specific treaty reference of this war crime in the treaties of international humanitarian law describing the forms of criminalised conduct. However, the substance of this war crime may be inferred from common Art. 3 GC which protects persons taking no active part in the hostilities against violence to life and person. In addition, this article provides that the wounded and sick shall be collected and cared for. If the personnel,

material, units or vehicles defined under Art. 8 (2) (e) (iii) are involved in activities for the collection and care of wounded and sick, such activities may be carried out only if the personnel, material, units or vehicles are protected against attacks.

aa) Peacekeeping missions

The legal instruments of international humanitarian law do not specifically address the protection of peacekeeping missions established in accordance with the Charter of the United Nations. However, the 1994 Convention on the Safety of United Nations and Associated Personnel prohibits attacks against United Nations and associated personnel, their equipment and premises. Art. 7 (1) of this Convention on the duty to ensure the safety and security of United Nations and associated personnel reads as follows:

> *"United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate."*

Art. 9 of the Convention is the basis for criminal prosecution:

> *"1. The intentional commission of:*
> *(a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;*
> *(b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;*
> *(c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;*
> *(d) An attempt to commit any such attack; and*
> *(e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack,*
> *shall be made by each State Party a crime under its national law."*

bb) Humanitarian assistance missions

The legal instruments applicable to non-international armed conflicts do not specifically deal with the protection of relief personnel.

However, attacks against such personnel, their installations, material, units or vehicles constitute a crime since such attacks would be equated to attacking civilians or civilian objects.

With regard to the protection of medical personnel as well as of medical units and transports the AP II contains specific rules in Arts. 9 and 11.

b) Legal basis

aa) Remarks concerning the material element

(1) General remarks

It appears that there are no decisions from the ICTY or the ICTR concerning this offence.

The conclusions stated under the section dealing with the respective crime in the context of international armed conflicts (Art. 8 (2) (b) (iii) of the Statute) also apply to a large extent to this offence when committed in the context of a non-international armed conflict. There are no indications in the ICC Statute that this offence has different special constituent elements in an international or non-international armed conflict. Both offences are formulated in exactly the same manner. Therefore, the sources relating to "attack" and "Humanitarian assistance or peacekeeping missions in accordance with the Charter of the United Nations" cited in PCNICC/1999/WGEC/INF.2/Add.1 are also of relevance in this context taking into account the specificities of internal armed conflicts.

(2) "As long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict"

In the context of a non-international armed conflict, it might be more problematic to determine what is meant by "As long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict".

The legal instruments applicable to non-international armed conflicts are not as explicit as the instruments applicable to international armed conflicts (Arts. 51 (3) and 52 (2) AP I) in defining the protection of civilians or civilian objects.

With regard to the protection of civilians Art. 13 (3) AP II might give the necessary guidance:

> *"Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities."*

From this, one may conclude that civilians lose their protection when and as long as they take a direct part in hostilities.[17]

There is no comparable provision in AP II concerning civilian objects. However, the indication found in Art. 52 (2) AP I for when an object is no longer entitled to protection as a civilian object might be of relevance in a non-international armed conflict as well, since this definition was used for both international and non-international armed conflicts in Art. 2 (6) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996):

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[17] With regard to UN personnel this element is also reflected in Art. 2 (2) of the which reads as follows:
"This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."

"[...] so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."

This definition was also used more recently in Art. 1 (6) of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 26 March 1999, which applies to non-international armed conflicts in accordance with Art. 22:

"'military objective' means an object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage".

From this rule one may conclude that an object is entitled to protection, unless and for such time as it is used to make an effective contribution to the military action of a party to a conflict.

(a) Peacekeeping missions

With respect to peacekeeping missions, as in the case of international armed conflicts, the above-mentioned general rules must be linked to Art. 2 (2) of the 1994 Convention on the Safety of United Nations and Associated Personnel, which reads as follows:

"This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."

Based on these rules, the personnel of peacekeeping missions are entitled to protection, unless and for such time as they take a direct part in hostilities, *i.e.* are engaged as combatants. Thus, the protection does not cease, in particular, if such persons only use armed force in exercise of their right to individual self defence. Installations, material, units or vehicles of peacekeeping missions are entitled to protection, unless and for such time as they are used specifically for these combatant purposes.

(b) Humanitarian assistance missions

Unlike in the GC and AP I for international armed conflicts there are no extensive rules on medical units, such as hospitals, equipment, etc., and relief units, as well as their personnel which describe more particularly the conditions under which the units or personnel lose their protection.

Art. 18 AP II on relief societies and relief actions simply provides:

"1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun [[18]]) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. [...]
2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned."

From this provision one might infer that relief missions are only protected if they perform their functions in relation to the victims of the armed conflict and in the manner described in para. 2 of Art. 18 AP II.

Art. 11 AP II, whose scope of application is limited to medical units and transports might be quoted in this context:

"1. Medical units and transports shall be respected and protected at all times and shall not be the object of attack.
*2. **The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function.** Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded." (emphasis added).*

There is no such explicit rule on medical personnel specifying when their protection ceases. In this regard, the ICRC commentary to Art. 9 indicates:

"Naturally, respect and protection imply that personnel in enjoyment thereof must refrain from all acts of hostility and will not themselves be made the object of attacks. Article 11 '(Protection of medical units and transports)' specifies that the units and transports in question must be 'respected and protected at all times and shall not be the object of attack'. This point is not contained in Article 9, which merely mentions respect and protection, and this omission could give rise to different interpretations."[[19]]

These activities involving medical units and transports as well as medical personnel are comparable to humanitarian assistance missions. In both cases, there is reason for according protection only if no hostile acts are committed outside their humanitarian functions. Therefore, one might infer from Art. 9 and 11 conditions under which humanitarian assistance missions lose their protection.

Even without a specific provision, at least the standard of the above-cited Art. 13 (3) AP II concerning civilians would apply.

Considering the wording of Art. 13 (3) AP II dealing with civilians and of Art. 11 (2) specifically dealing with medical units and transports, two distinct formulations are chosen to describe when a loss of protection occurs: when they *"take a direct part in hostilities"* on the

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[18] Since 1980, this emblem is no longer used.
[19] Junod, in: Commentary on the AP, Art. 9, No. 4673, p. 1421 (emphasis added, footnotes omitted).

one hand and when *"they are used to commit hostile acts, outside their humanitarian function"* on the other hand. The first standard might be helpful to determine when the personnel of humanitarian assistance missions lose their protection and the second to determine when installations, material, units or vehicles of such missions lose their protection.

Analysing the few sources available one might conclude that, for this issue, there is no difference in substance considering international and non-international armed conflicts. With regard to international armed conflicts we reached the conclusion that the personnel of humanitarian assistance missions lose their protection if they *commit hostile acts outside their humanitarian function* (reference was made to Art. 11 (2) AP I). Installations, material, units or vehicles of humanitarian assistance missions lose their protection *if they are used to commit, outside the missions' humanitarian function, acts harmful to the enemy* (reference was made to Arts. 21 GC I, 34 GC II, 19 GC IV, 13 AP I).

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

Art. 8 (2) (e) (iv) - Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives

1. Results from the sources

Material elements

(1) The perpetrator unlawfully directed attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected.
(2) The objects were not military objectives.

Mental element

(3) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The terms "Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives" are derived to a large extent from Art. 27 and 56 of the 1907 Hague Regulations. However, it must be indicated that the Hague Regulations do not directly apply to non-international armed conflicts. An explicit treaty reference for this offence in internal armed conflicts does not exist. However,

there are other provisions of relevance (e.g. AP II, Hague Convention of 1954 for the Protection of Cultural Property) which are applicable in internal armed conflicts. These will be cited below.

b) Legal basis

It appears that there are no decisions from the ICTY or the ICTR concerning this offence.

The conclusions stated under the section dealing with the respective offence in the context of international armed conflicts (Art. 8 (2) (b) (ix) of the Statute) also apply to this offence when committed in the context of a non-international armed conflict. Given that both offences are formulated in exactly the same manner there are no indications in the ICC Statute or other sources that this offence has different special constituent elements in an international or non-international armed conflict.

However, a number of rules which might be of relevance for the interpretation of the elements of this offence have developed, giving specific protection to specific objects in times of non-international armed conflicts.

aa) Buildings dedicated to religion, education, art, science or charitable purposes, historic monuments

(1) General protection

The above-cited Art 56, which must be read in connection with Art. 27 of the Hague Regulations, is still valid under customary international law and applies to non-international armed conflicts as well.

(2) Specific Protections

- Cultural or religious objects

The following provision of AP II contains specific rules on historic monuments, works of art or places of worship:

> Art. 16
> *"Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort."*[20]

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[20] On the scope of the rule of protection the ICRC Commentary on AP II states:
"Protection of cultural objects and places of worship is achieved by means of two complementary rules, each involving a prohibition:
1) it is prohibited to commit 'any acts of hostility directed against'.
An act of hostility means any act related to the conflict which prejudices or may prejudice the physical integrity of protected objects. In fact, the article does not only prohibit the bringing

As it is pointed out in the ICRC Commentary to this provision,

> *"[t]he expression 'without prejudice to' means that the conditions of application of the Convention are not modified by the Protocol, only of course as far as a Contracting Party is bound by the Convention. If it is not, only Article 16 applies."*[21]

Cultural Property

The Hague Convention of 1954 for the Protection of Cultural Property, which defines cultural property in Art. 1, applies also to non-international armed conflicts[22]. The specific protection

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about of deleterious effects as such, but any acts 'directed' against protected objects. Thus it is not necessary for there to be any damage for this provision to be violated.
2) it is prohibited to use protected objects in support of the military effort.
'Military effort' means any military activities undertaken for the conduct of hostilities. The second prohibition is the counterpart of the first, indispensable to ensure respect for this rule. If such objects were used in support of the military effort, they could become military objectives, assuming that their total or partial destruction offered the adversary a specific military advantage, and as a result their protection would become illusory. In such a situation the question is if and exactly at what moment there is a right to attack such protected objects in the event that the second prohibition is not respected. Such a possibility should not be accepted without duly taking into account the fact that the objects concerned are of exceptional interest and universal value. All possible measures should be taken to endeavour putting a stop to any use in support of the military effort (by giving due warnings, for example) in order to prevent the objects from being destroyed or damaged. In any case this is the spirit of the provision: it is an invitation to safeguard the heritage of mankind.".

Junod, in: Commentary on the AP, Art. 16, No. 4845 *et seq.*, p. 1470 (footnote omitted).
Concerning the second aspect reference shall be made also to the corresponding commentary to Art. 53 AP I which clarifies the conditions under which a protected object may be attacked when it is used to support the military effort:

> *"If protected objects were used in support of the military effort, this would obviously constitute a violation of Article 53 of the Protocol, though it would not necessarily justify attacking them. To the extent that it is admitted that the right to do so does exist with regard to objects of exceptional value, such a right would depend on their being a military objective, or not, as defined in Article 52 [...] paragraph 2. **A military objective is an object which makes 'an effective contribution to military action' for the adversary, and whose total or partial destruction, capture or neutralization 'in the circumstances ruling at the time, offers a definite military advantage' for the attacker. These conditions are therefore stricter than the simple condition that they must be 'in support of the military effort'.** For example, it is not permitted to destroy a cultural object whose use does not make any contribution to military action, nor a cultural object which has temporarily served as a refuge for combatants, but is no longer used as such. In addition, all preventive measures should be taken to terminate their use in support of the military effort (warnings, injunctions etc.) in order to prevent the destruction or damage of cultural objects. However, if it is decided to attack anyway, the principle of proportionality should be respected, which means that the damage should not be excessive in relation to the concrete and direct military advantage anticipated, and all the precautions required by Article 57 [...] should be taken."*

Wenger, in: Commentary on the AP, Art. 16, No. 2079, p. 648 (emphasis added, footnote omitted).

[21] Junod, in: Commentary on the AP, Art. 9, No. 4832, p. 1467 (footnote omitted). It should be noted that, unlike Article 53 '(Protection of cultural objects and of places of worship)' of AP I, the article under consideration here does not make reference to other applicable international instruments. In the absence of an explanation on this point in the Official Records, it may be recalled that the Hague Conventions of 1907 are not specifically applicable to non-international armed conflicts. However, this does not exclude that norms or customary international law might be of relevance.

of such cultural property is defined in particular in Art. 4. For further details see the discussion on the respective offence committed in international armed conflicts (PCNICC/1999/WGEC/INF.2/Add.1).

N.B. The recently adopted Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property[23], also applicable in non-international armed conflicts (Art. 22), further develops Art. 4 (2) of the 1954 Convention in Art. 6 (waiver of protection). A special case of enhanced protection is dealt with in Art. 12. The Protocol contains specific criminality clauses in Art. 15 (1).

For further details see the discussion on the respective offence committed in international armed conflicts (PCNICC/1999/WGEC/INF.2/Add.1).

Religious objects

Religious objects may fall under the above-cited protections defined in AP II or the Hague Convention of 1954 on the Protection of Cultural Property if they *constitute the cultural or spiritual heritage of peoples* (AP II) or fulfil the conditions set forth in Art. 1 of the 1954 Hague Convention. However, it has to be indicated that they remain protected under customary international law without these additional qualifications to the same extent as civilian objects.

Objects dedicated to education and science

These objects may also fall under the above-cited protections defined in AP II or the Hague Convention of 1954 on the Protection of Cultural Property if they *constitute the cultural or spiritual heritage of peoples* (AP II) or fulfil the conditions set forth in Art. 1 of the 1954 Hague Convention. However, if they do not fall under those definitions, they are protected under customary international law to the same extent as civilian objects.

bb) Hospitals and places where the sick and wounded are collected

Only one specific rule contained in a treaty of international humanitarian law according protection for hospitals and places where the sick and wounded are collected is applicable to non-international armed conflicts. Art. 11 AP II reads as follows:

> *"1. Medical units and transports shall be respected and protected at all times and shall not be the object of attack.*
> *2. The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may, however, cease only after a warning has been given setting,*

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[22] Art. 19: *"1. In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property."*

[23] Second Protocol to the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict adopted on 26 March 1999 (The Hague).

whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded."

In addition, the protection may be inferred from common Art. 3 GC which states that *"[t]he wounded and sick shall be collected and cared for."* The collection and care of wounded and sick may be carried out only if the hospitals and places where sick and wounded are collected are protected against attacks.

Further rules under customary international law might be of relevance.

cc) Loss of protection

The objects listed in Art. 8 (2) (e) (iv) ICC Statute are only protected provided they are not military objectives. Unlike in international armed conflicts there is no explicit definition of military objectives. However, the definition found in Art. 52 (2) AP I is of relevance in a non-international armed conflict too, as it was used for both international and non-international armed conflicts in Art. 2 (6) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996) and more recently in Art. 1 (6) of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 26 March 1999.

With respect to medical and cultural objects it should be noted that precise indications are given as to when those objects lose their protection (For cultural property see Art. 4 (2) of the 1954 Hague Convention together with Art. 6 (a) and (b) of the Second Protocol thereto and Art. 13 of that Protocol. For hospitals and places where the sick and wounded are collected see Art. 11 1st sentence AP II.), and further conditions are stipulated before they may be attacked (For cultural property see Art. 4 (2) of the 1954 Hague Convention together with Art. 6 (c) and (d) of the Second Protocol thereto and Art. 13 of that Protocol. For hospitals and places where the sick and wounded are collected see Art. 11 2nd sentence AP II.).

Art. 8 (2) (e) (ix) - Killing or wounding treacherously a combatant adversary

1. Results from the sources

Material elements

(1) The perpetrator invited the confidence of a combatant adversary and to believe that he/she was entitled to or is obliged to accord protection under the rules of international law applicable in armed conflict.
(2) The perpetrator killed or injured that combatant.
(3) In killing or injuring, the perpetrator made use of the confidence invited by him/her.

Mental element

(4) The perpetrator acted wilfully and with the specific intent to kill or injure by means of the betrayal of confidence.

2. Commentary

a) Treaty reference of the war crime

The terms "Killing or wounding treacherously a combatant adversary" are derived to a large extent from Art. 23 (b) of the Hague Regulations. However, it must be indicated that the Hague Regulations do not directly apply to non-international armed conflicts. An explicit treaty reference for this offence in internal armed conflicts does not exist.

b) Legal basis

In a general analysis of customary international law applicable in non-international armed conflicts, the ICTY found that the prohibition of perfidy in international armed conflicts applies to internal armed conflicts as well.[24] The Tribunal did not specifically base itself on the above-cited Hague rule, or the rule in Art. 37 AP I, but referred to a case brought before Nigerian courts wherein the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations.[25]

It appears that there are no other decisions from the ICTY or the ICTR concerning this offence. However, some military manuals that apply also to non-international armed conflicts contain a definition of perfidy that reflects *grosso modo* the definition of Art. 37 AP I.[26] In a memorandum of understanding between Yugoslavia, Croatia and Serbia, the parties agreed to abide by the prohibition of perfidy as described in Article 37 AP I. The memorandum extended, on the basis of common Art. 3 GC, the applicability of Art. 37 AP I to internal armed conflicts. A similar agreement was concluded by the parties to the conflict in Bosnia-Herzegovina.

The conclusions stated under the section dealing with the offence of "Killing or wounding treacherously individuals belonging to the hostile nation or army" (Art. 8 (2) (b) (xi) of the Statute) in the context of international armed conflicts apply to a large extent also this offence when committed in the context of a non-international armed conflict. With respect to the

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[24] ICTY, *The Prosecutor v. Dusko Tadic*. Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, IT-94-1-AR72, para. 125, p. 67.

[25] Nigeria, Supreme Court, *Pius Nwaoga v. The State*, International Law Reports Vol. 52 (1979), pp. 496 *et seq.* The Court found *inter alia*:

> *"[...] That the appellant and those with him were not in the rebel army uniform but were in plain clothes, appearing to be members of the peaceful private population.*
> *On these facts, if any of these rebel officers, as indeed the appellant did, commits an act which is an offence under the Criminal Code, he is liable for punishment, [...], whether or not he is acting under orders.*
> *We are fortified in this view by a passage from Oppenheim's International Law, 7th Edition, Volume II, at page 575, dealing with War Treason, which says:*
> 'Enemy soldiers - in contradistinction to private enemy individuals - may only be punished for such acts when they have committed them during their stay within a belligerent's lines under disguise. If, for instance, two soldiers in uniform are sent to the rear of the enemy to destroy a bridge, they may not, when caught, be punished for 'war treason', because their act was one of legitimate warfare. But if they exchanged their uniforms for plain clothes, and thereby appear to be members of the peaceful private population, they are liable to punishment.'"

[26] Leyes de Guerra, PC-08-01, aprobado por Resolución N°489/89 del Ministerio de Defensa (1990); Australian Defence Force Manual on Law of Armed Conflicts - Interim Edition - ADFP-37 (1994); International Humanitarian Law (the Law of armed Conflict), Presentation on the South African Approach to International Humanitarian Law - Appendix A, White Paper on Defence, Department of Defence (1996).

conduct of the perpetrator (*i.e.*, the killing or wounding by means of treachery), the offences are defined in exactly the same manner. Therefore, there are no indications in the ICC Statute or other sources that this offence has different special constituent elements in an international or non-international armed conflict.

As it has been described in the study to Art. 8 (2) (b) (xi) ICC Statute, apart from the problematic field of assassinations, it seems to be uncontroversial, on the basis of Art. 37 AP I, that perfidious or treacherous acts are constituted by two specific elements. Firstly, the act in question must objectively be of a nature to cause or at least to induce the confidence of an adversary. This confidence must be created because of a precisely specified legal protection which either the adversary himself is entitled to or is a protection which he is legally obliged to accord to the adversary. As pointed out by Art. 37 AP I, this protection must be prescribed by rules of international law applicable in armed conflict. In the context of an internal armed conflict such legal protection must be prescribed by rules of international law applicable in non-international armed conflicts. Secondly, the definition contains a subjective element. The act inviting confidence must be carried out intentionally in order to mislead the adversary into relying upon the protection he expects.[27]

With respect to the victims, however, the wording of the crime in a non-international armed conflict is slightly different. It uses the term "combatant adversary" instead of "individuals belonging to the hostile nation or army". The term "combatant" used in the context of a non-international armed conflict may cause some problems, since the legal instruments applicable in internal armed conflicts, including AP II, do not contain the concept of combatant. There are no provisions comparable to Art. 43 AP I defining armed forces and combatants. However, common Art. 3 as well as Arts. 4 (1) and 13 (3) of AP II contain the essential ingredients to make a determination in so far as they make a distinction between persons taking an active/direct part in hostilities and those who do not.

One might thus conclude that combatants in non-international armed conflicts are persons taking an active/direct part in the hostilities.

N.B. Comparing the wording of this offence with Art. 8 (2) (b) (xi) applicable in international armed conflicts, one might ask whether the category of potential victims in internal armed conflict is more restrictive. While Art. 8 (2) (b) (xi) refers to "individuals belonging to the hostile nation or army", this crime refers only to "combatants adversary". This might lead to the conclusion that killing or wounding of a civilian adversary by means of perfidy is not a war crime under Art. 8 (2) (e) (ix) whereas - on the basis of the explicit wording - the same act would be a crime in international armed conflicts.

However, based on the fact that in international armed conflict both the unqualified killing or wounding and the perfidious killing and wounding of a civilian adversary are war crimes, it may be concluded that the killing or wounding of a civilian adversary by means of perfidy might be an aggravating factor. In internal armed conflicts, however, this is not properly reflected, although at least the killing or wounding of a civilian adversary in an internal armed conflict is a war crime under Art. 8 (2) (c) (i).

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[27] Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 37, pp. 204 *et seq.*; Ipsen, Perfidy, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 3 (1997), p. 978.

Art. 8 (2) (e) (x) - Declaring that no quarter will be given

1. Results from the sources

Material elements

(1) The perpetrator ordered that there shall be no survivors, [or threatened an adversary therewith] or conducted hostilities on this basis.

Mental element

(2) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

Art. 4 (1) 3rd sentence AP II contains the prohibition *"to order that there shall be no survivors"*. In addition, the substance of this war crime may be inferred from common Art. 3 GC which states that *"[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, [...]. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person"* and *"[t]he wounded and sick shall be collected and cared for."* These provisions clearly indicate that there must be no denial of quarter.

b) Legal basis

It appears that there are no decisions from the ICTY or the ICTR concerning this offence.

The conclusions stated under the section dealing with the offence of "Declaring that no quarter will be given" (Art. 8 (2) (b) (xii) of the Statute) in the context of international armed conflicts also apply to this offence when committed in the context of a non-international armed conflict. Given that both offences are formulated in exactly the same manner there are no indications in the ICC Statute or other sources that this offence has different special constituent elements in an international or non-international armed conflict.

With respect to Art. 4 (1) 3rd sentence AP II the ICRC Commentary supports this view:

> *"This is one of the fundamental rules on the conduct of combatants inspired by Hague law. It is aimed at protecting combatants when they fall into the hands of the adversary by prohibiting a refusal to save their lives if they surrender or are captured, or a decision to exterminate them. The text of the draft was more explicit and read as follows: 'It is forbidden to order that there shall be no survivors, to threaten an adversary therewith and to conduct hostilities on such basis.' **The present wording is briefer, but does not alter the essential content of the rule.***

Clearly respect for this rule is fundamental. It is a precondition governing the application of all the rules of protection laid down in the Protocol, for any guarantees of humane treatment, any rule on care to be given the wounded and sick, and any judicial guarantees would remain a dead letter if the struggle were conducted on the basis of orders to exterminate the enemy."[28]

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[28] Junod, in: Commentary on the AP, Art. 4, No. 4525, p. 1371 (emphasis added, footnotes omitted).